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NO. 72-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

JOHN H. ELLIS, et al.,
Petitioners,

v.

THE FLYING TIGER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Question Presented:

The only issue here is whether the Court of Appeals was correct in determining that the District Court had grossly abused its discretion in awarding plaintiffs' attorneys* a

* While the case still bears the original title under which it was filed in the District Court, the true petitioners in interest are Howard Arvey, Esq. and John J. Enright, Esq., attorneys, and their law firm, Arvey, Hodes & Mantynband, the petitioners (hereinafter referred to as "plaintiffs' counsel") and one of the original defendants, The Flying Tiger Corporation (hereinafter referred to as "Flying Tiger"). All other parties were dismissed pursuant to the settlement agreement which ended the action except as to a "reasonable fee" for plaintiffs' counsel. The petition for a writ of certiorari and the opinion of the Court of Appeals printed as an Appendix thereto are cited "Pet. ....." and "Op. .....", respectively; the appendix in the Court of Appeals is cited "App. .....".

fee of $600,000 (over $1,000 per hour), in addition to $50,000 agreed to be paid by their clients, in a case in which no corporate wrong was redressed, no discovery was had and the parties entered into a settlement agreement which did not require payment of money and which agreement was primarily made because of (a) the occurrence of an intervening tax ruling making the dividend taxable to the recipient, and (b) havoc created by an ill advised temporary injunction obtained by plaintiffs' counsel against the payment of a stock dividend.

Counter Statement of the Case:

Contrary to petitioners' statement (Pet. 3), this case bears no relationship whatever to *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), nor to any other case involving "corporate therapeutics". The interlocutory injunction which resulted in the $600,000 fee award corrected no corporate wrongdoing. The injunction was directed against the issuance of a 5% stock dividend pursuant to the terms of a convertible preferred stock, which terms had been fully described in a proxy statement and approved by stockholders. The dividend enjoined was not part of the merger to which plaintiffs' complaint was addressed. Neither the gravaman of the complaint nor the papers seeking the injunction alleged that the stockholders' consent was not properly obtained or that the terms of the dividend were not properly described in the proxy statement. The case was settled before discovery commenced. The settlement agreement providing for the payment of a "reasonable" fee was reached not because of any wrongdoing by Flying Tiger, but to prevent a tax inequity occasioned by a proposed I.R.S. regulation (§ 1.305-3(d), 36 Federal Register No. 53) promulgated March 18, 1971 after the declaration of the dividend and to remedy the calamitous situation created by the temporary injunction obtained by plaintiffs'

counsel which resulted in suspension of trading on both the New York and American Stock Exchanges of all Flying Tiger stock with disastrous results to its stockholders, including the class represented by plaintiffs' counsel.

In early August 1970, Flying Tiger made a tender offer for North American Car Corporation (hereinafter referred to as "North American") which was originally opposed by a lawsuit brought by North American's management (App. 22-24). In the latter part of August, the opposition was terminated and litigation dismissed with the consent of North American's management (App. 54, 59).

On November 23, 1970, a joint proxy statement which had been reviewed by the SEC before mailing, and all the Commission's comments included, was sent to North American and Flying Tiger stockholders for the purpose of voting on the adoption of a plan and agreement of merger (App. 43, 56). Each stockholder of North American was to receive in a taxable exchange one share of new $1.20 Series Cumulative Convertible Preferred Stock of Flying Tiger and ⅓ of a warrant to purchase, on or after the middle of 1971, one share of Flying Tiger common stock, at a price of $31 per share, until the end of 1975. Each share of $1.20 Series Cumulative Preferred Stock was to be convertible into seven-tenths (7/10ths) of one share of the common stock of Flying Tiger (App. 50, 55, 162). Protection from dilution of the conversion privilege of the Preferred Stock and warrants was provided, except that the proxy statement made clear that there would be no adjustment of the conversion privilege in the event of annual 5% common stock dividends by Flying Tiger for two years (App. 55, 162). The payment of one of these dividends was the object of the injunction leading to the settlement for which the $600,000 was awarded.

On Friday, December 18, 1970, one full month after the merger proxy statement was mailed, and just a weekend away from the date set for the meeting, December 21, 1970, plaintiffs' counsel commenced this action with a motion to enjoin the proposed merger (App. 13-41). Plaintiffs' primary ground for seeking an injunction was a claim of an allegedly improper and undisclosed "deal" between North American management and Flying Tiger to settle the prior litigation (App. 25-26). It later appeared that plaintiffs' counsel had been retained by a few substantial North American shareholders whose principal objection to the merger was that it was not tax free (App. 13-14, 68). It also later appeared that the shareholders had agreed to pay plaintiffs' counsel up to $50,000 in counsel fees to attack the merger because it constituted a taxable event to them. General Lasher, Chairman of the Board of North American, was the principal witness at brief evidentiary hearings of a few hours on Friday, December 18, and on Monday December 21, 1970 (App. 59-65). The trial court specifically stated that General Lasher's "conduct has been admirable" and with respect to him and the other directors, said:

> "These men used good judgment. The General fought a good fight, he and his men, and very wisely retreated at the proper time. They did all they could do to save what they could and get the best deal that they could out of that for the stockholders. I think he acted in good faith and these men that remained there acted the best they could under all of the circumstances." (App. 59).

Thus, *contra* to the complaint there is a specific finding that the management of North American was not promised any benefits or inducements in order for Flying Tiger to secure control of North American (App. 59). Nevertheless, Judge Perry announced from the bench that he would grant

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a preliminary injunction prohibiting the merger but permitting the voting to proceed which was scheduled for 2:00 p.m. on that day (App. 62, 65).

On Tuesday, December 22, after a further hearing of one hour, largely consumed by the statement of Wayne M. Hoffman, Chairman and Chief Executive Officer of Flying Tiger, the trial court abruptly changed its mind and entered an order dissolving the preliminary injunction and permitting the merger to become effective on January 7, 1971 (App. 65-81, 123). The order further provided that North American's business should be held separate so as to permit divestment if the litigation were determined adversely to defendants (App. 122-24). The stockholders of North American overwhelmingly approved the merger and it was consummated on January 7, 1971 (App. 341).

On March 9, 1971, Flying Tiger, as it had stated it might do in the prior proxy statement, declared a 5% dividend on its common stock payable to shareholders of record on March 26, 1971 (App. 161). Under the rules of the New York Stock Exchange, this meant that the Flying Tiger common stock commenced trading "ex-dividend" on March 22, 1971.*

On Monday, March 22, 1971, after ex-dividend trading had commenced, counsel for defendant Flying Tiger first received notice from plaintiffs' counsel that on the following day in the lawsuit challenging the merger, they would seek a preliminary injunction preventing payment of the 5% stock dividend which had not previously been challenged by way of pleadings or argument (App. 167).

On March 23, 1971, brief hearings were held on this motion. In spite of defendants' attorneys' statements as to

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* Rules of the New York Stock Exchange provide that shares of stock trade for five market days before the effective date of the dividend, without including that dividend in those sales.

the importance of the motion to all the stockholders, the drastic effects on the market which would follow from the entry of an injunction, and in spite of the offer to present testimony, a preliminary injunction was granted from the bench by Judge Perry enjoining the issuance of the 5% stock dividend, although the stock then had been trading "ex-dividend" for two days (App. 170, 172, 175, 181-82). On the same afternoon, defendants filed an emergency motion with the Court of Appeals seeking to dissolve the preliminary injunction (App. 7). The emergency nature was recognized and a hearing on expedited briefs was set for April 1, 1971 (App. 250). On March 24, 1971, trading of Flying Tiger stock and warrants was halted by the New York and American Stock Exchanges because of the uncertainty as to the value of all Flying Tiger securities created by the injunction (App. 191, 249).

As a result of the havoc created by the injunction, attorneys for the plaintiffs and defendants met in New York on Sunday, March 28, 1971, with New York counsel for Flying Tiger, for the purpose of eliminating this chaos and securing the resumption of trading (App. 305-07). Discussion of the market problem was expanded to include possible settlement of the litigation. It was pointed out that an unforeseeable intervening development in the tax law occurring *after* the declaration of the dividend by Flying Tiger indicated the 5% stock dividend might be taxable to the Flying Tiger common stockholders unless a corresponding dilution adjustment was made in the convertibility terms of the preferred stock and warrants (App. 307, 317).

As stated by the Court of Appeals in its opinion, the settlement was effected by Flying Tiger that Sunday in New York, not because of the efforts or skill of plaintiffs' counsel but "primarily in order to avoid the impact of such [tax] regulations" (Op. 5a).

The Court of Appeals also correctly pointed out that plaintiffs' counsel had reasons other than benefit to the class which motivated both them and Flying Tiger to settle —viz., "a detrimental and perhaps disastrous economic effect on all Flying Tiger shareholders, including the plaintiff class"* of the injunction so rashly obtained by plaintiffs' counsel which necessitated the suspension of trading (Op. 6a).

On Monday, March 29, 1971, Flying Tiger's emergency appeal was dismissed by agreement in the Court of Appeals and later the same day, upon joint motion, the trial court dissolved the minute order of March 23, 1971, by which the payment of the stock dividend had been enjoined; trading in Flying Tiger securities resumed the next day (App. 342).

A joint stipulation of settlement was submitted to the trial court providing for the submission to Flying Tiger stockholders of an amendment to the terms of the preferred stock and warrants so as to provide dilution protection for such stock and warrants in the event of any stock dividend on the Flying Tiger common stock (App. 191-92). Following approval of the change in the terms of the security by Flying Tiger shareholders and notice to the class, the trial court entered a final judgment approving the settlement and disposing of the class action (App. 201-04).

The final agreed upon order dismissed the complaint as against all defendants, with prejudice, on the merits (App. 202) and provided for payment of "reasonable" attorneys' fees and disbursements to plaintiffs' counsel to be paid by Flying Tiger (App. 203). Plaintiffs' counsel filed a petition

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* The opinion notes that plaintiffs' counsel conceded at oral argument in the trial court that his primary purpose in going to New York was "to obtain the resumption of trading" and that the settlement agreement states plaintiffs' concern about the "suspension of trading privileges." (Op. 6a)

for fees and disbursements, along with a memorandum of authorities and appendix of fee information (App. 204-47). In their reply to defendants' memorandum, plaintiffs' counsel alleged that they devoted a total of 797.10 hours to the matter, but 226.8 hours were admitted to have been devoted solely to the petition for fees by them (App. 299). No specified amount for the fee was requested in the petition (App. 212, 336).

Plaintiffs' counsel had a fee arrangement with the named plaintiffs whereby they were paid $20,000 to institute the case and were to be compensated for time expended up to a total of $50,000, after which the fee would be negotiated (App. 211). While this agreement was alleged by plaintiffs' counsel to be a contingent arrangement, firm and in writing (App. 272), it was never made a part of the record in either court below.

During a two-hour hearing on the issue of attorneys' fees, the trial court heard oral argument from both sides (App. 303-19). No testimony or other evidence was submitted by plaintiffs' counsel. Attorneys for the defendant filed materials with the court from the case of *Morgan* v. *Meyercord*, 70 C 2262 (N.D. Ill. 1971) dealing with appropriate standards and rates with respect to court awards of attorneys' fees in matters of this type in the Northern District of Illinois (App. 320-23).

The trial court requested both parties to submit findings of fact and conclusions of law (App. 328). Defendants' proposed findings utilized the rates established in *Morgan, supra*, which would result in a fee of $51,510 (App. 326). Plaintiffs' counsel's proposed findings were adopted *in toto* by the court except for a minor omission (Compare App. 329-38, 339-48). The $600,000 largesse was inserted by the court in the blank left in the order submitted by plaintiffs' counsel (App. 338).

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Flying Tiger's appeal from the awarded fees resulted in a Court of Appeals decision reducing these fees. Rehearing was denied. The petition for certiorari followed.

I.

PRINCIPLES OF "CORPORATE THERAPEUTICS" ARE INAPPLICABLE IN THE INSTANT CASE

Understandably loathe to admit that they seek certiorari in this case because of economic considerations personal to counsel, petitioners have distorted the factual and legal issues in an effort to find a more acceptable rationale for the restoration of the fee award which averaged over $1,000 per hour.

There is no basis for the wildly unfounded assertion made in plaintiffs' counsel's statement that *"corporate wrong-doing of the kind involved in cases such as this* cannot depend exclusively on the criminal law and other governmental action for its cure" (Pet. 9, emphasis added). There was no corporate wrong-doing. This gratuitous statement, devoid of concrete support in the record, is uncalled for and offensive.

The claim put forward by plaintiffs in their lawsuit attempting to block the merger was that there had been an improper and undisclosed arrangement between North American management and Flying Tiger. This claim was specifically rejected by the trial court, which after several hearings permitted the merger to proceed.

The preliminary injunction, which can be the only basis for awarding the fee, related to the dilutive aspect of a dividend which was not part of the challenged merger, but was declared eight weeks after the merger had been accomplished. The ultimate settlement agreement providing for reasonable attorneys' fees was precipitated by suspension

of trading resulting from an injunction improvidently granted against payment of a 5% stock dividend. The settlement had nothing to do with the merger or corporate wrongdoing. The settlement agreement expressly stated that such antidilution protection as thereunder afforded was extended primarily to avoid the adverse impact of recently announced tax regulations. It contained no concession of liability. In the entire record there is no evidence suggesting even so much as technical culpability on the part of Flying Tiger, much less an adjudication or concession of deliberate wrongdoing. To analogize those facts to instances in which large fees have been justified for remedying corporate wrongs and in which there have been imposition of penal sanctions is to depart entirely from reality.

It is similarly deceptive to cloak with unwarranted significance, in this attempt to swell attorneys fees, general language dealing with "corporate therapeutics" found in *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375 (1970).* In that case policies of corporate suffrage as protected by Section 14 (a) of the Securities Exchange Act of 1934 were at issue. No such policies are involved in this case. Unlike *Mills*, there has been and could be no finding of intentional or inadvertent liability under the securities laws, no incremental benefit to the corporation as a whole, and no vindication of statutory policies to justify an imposition of counsel fees upon Flying Tiger.

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* *Mills* itself makes no reference to the quantum of fees to be awarded but is concerned solely with *whether* such an award is appropriate.

II.

PLAINTIFFS' COUNSEL'S FEE ARRANGEMENT WAS NOT CONTINGENT

Petitioners characterize their fee arrangement as contingent (Pet. 2). While the petition explores in substantial detail the frequency and diversity of recognized contingent fee arrangements, no attempt is made to provide insight as to what was the actual understanding between plaintiffs and their counsel.

Plaintiffs' counsel's own statements established that the hazard as to uncompensated time was greatly minimized when compared to what is customarily denominated a contingent fee. Plaintiffs' counsel has admitted that its clients had agreed to advance $20,000 on filing of the lawsuit to be applied against charges to be made for time to be expended. An additional advance of $30,000 was agreed to for further time charges, which thus obligated plaintiffs' counsel's clients for fees of $50,000 if the time expended reached that figure (App. 211, 272).* Applying rates found proper for skilled and experienced securities lawyers in the recent case of *Morgan* v. *Meyercord*, *supra*, results in a total fee for all time expended in this case by plaintiffs' counsel, including that devoted to their petition for fees, of just in excess of the $50,000 agreed upon, so that adequate compensation for their total effort here was provided by their client without any need for "incentive awards". Under this alleged arrangement, success was not a condition precedent to substantial compensation.

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* Unfortunately, if there are any other relevant aspects of this agreement, they are not known to Flying Tiger, since plaintiffs' counsel chose not to make their written fee agreement a part of the record.

III.

AN AWARD OF ATTORNEYS FEES OF $600,000 IN THE CIRCUMSTANCES OF THIS ABBREVIATED ACTION WAS AN ABUSE OF JUDICIAL DISCRETION PROPERLY CORRECTABLE BY THE APPELLATE COURT

Precedent from this Court firmly establishes that a reviewing tribunal pursuant to Rule 52(a) of the Federal Rules of Civil Procedure may set aside the findings of fact of a trial court made without a jury if found on the record to be clearly erroneous *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-95 (1947). The burden of this standard is greatly relaxed, if not entirely dispensed with, where, as here, such findings are inferences drawn from documentary evidence or undisputed facts and thus in no way dependent upon candor or credibility of witnesses *United States* v. *United Steelworkers of America*, 271 F.2d 676 (3rd Cir. 1959), *aff'd.* 361 U.S. 39 (1959). Moreover, such persuasiveness as might be accorded to the findings adopted by the trial court is substantially diminished since "these detailed findings were 'mechanically adopted' to use the phrase of the late Judge Frank in *United States* v. *Forness*, 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case." *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 657 (1964). See: *Holbrook* v. *Institutional Insurance Company of America*, 369 F.2d 236, 242 (7th Cir. 1966); *Rosenblatt* v. *Northwest Airlines, Inc.*, 435 F.2d 1121, 1124 n.1 (2nd Cir. 1970); *In Re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 n.2 (2nd Cir. 1970); *Roberts* v. *Ross*, 344 F.2d 747, 752 (3rd Cir. 1965).

Finally, the appellate court acted fully in accord with accepted practice in cases of this type in reducing without remand the fee award found excessive *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Harris* v. *Chicago Great West-*

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ern Ry. Co., 197 F.2d 829 (7th Cir. 1952). There existed neither logical nor legal basis for remand. The ultimate finding of reasonableness "is a conclusion of law or a determination of a mixed question of law and fact, [where] we may substitute our judgment for that of the trial court . . . we may ignore the trial judge's finding and substitute our own." *Fritz* v. *Jarecki*, 189 F.2d 445, 448 (7th Cir. 1951). Accord, *Merchants National Bank & Trust Co.* v. *United States*, 246 F.2d 410, 417 (7th Cir. 1957), *cert. denied*, 355 U.S. 881 (1957); *Lewyt Corporation* v. *Health-Mor, Inc.*, 181 F.2d 855, 857 (7th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950). See also *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373, 376 (1941), *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F.2d 80, 90 (2d Cir. 1961), *cert. denied* 368 U.S. 986 (1962).

IV.

THERE IS NO CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND OTHER CIRCUITS AS TO PROPER STANDARDS GOVERNING FEE AWARDS

Petitioners in their request for a writ concede that despite overall uniformity with respect to fee standards, subsidiary rules may be dependent on the "nature and reason for the granting of attorneys' fees" (Pet. 8). It is precisely such variations in factual context rather than any fundamental conflict as to applicable law that caused the Seventh Circuit to conclude that any element of benefit conferred here did not support the fees thought appropriate by petitioners. Rather, the opinion makes clear that modification of the judgment below was deemed necessary not because of rejection of prevailing legal criteria but because of a conviction that "under the particular circumstances of this case," . . . "a relatively large percentage award is not appropriate" (Op. 4a). This conclusion was based upon the record facts showing that any benefits accruing were

not clearly attributable to the direct effort and skill of the attorneys involved.

Petitioners cite *Angoff* v. *Goldfine*, 270 F.2d 185, 189 (1st Cir., 1959) as listing the proper factors to be considered in fixing compensation and conclude that "The Seventh Circuit in this case reduced these complexities to the single, simplistic standard of a proper hourly rate of compensation . . ." (Pet. 9). However, the Seventh Circuit adhered to the same standards articulated in *Angoff*, and in fact cited that decision with approval in support of the following statement:

> "It has been generally held that an appropriate award of attorneys' fees should be determined on the basis of several elements, including the skill and reputation of counsel, the time expended by attorneys in preparing the case, the novelty and difficulty of the legal issues presented, and the benefits conferred upon the class. *Angoff* v. *Goldfine*, 270 F.2d 185 (1st Cir. 1959); [other citations omitted]" (Op. 3a).

Indeed, the opinion of the Court below dwells more on the single consideration of benefits conferred than on any other factor. Patently, it was not disregard of this factor, but a positive determination thereunder that petitioners' contribution bore no significant causative relationship to any benefits attained that influenced the Court to reduce the initial award. Such a finding discloses no inconsistency among the Circuits as to principle, but only suggests a quite properly particularized application of the agreed legal standards to the facts at bar.

This principle is perhaps even more strikingly exhibited by a more recent case from the First Circuit, which the petitioners have chosen as a model of the alleged conflict as to standards. In *Green* v. *Transitron Electronic Corp.* 326 F.2d 492 (1st Cir. 1964) (Pet. 8), the First Circuit had

occasion to express its disapproval of awards based on standard percentage formulas, thus amply demonstrating the hazard of construing *Angoff* (or any other decision) as authority for the application of inflexible formulas.

In the Court below Judge Wyzanski had expressed the same concern reflected by the Seventh Circuit in *Milwaukee Towne Corp.* and *Harris* as to awards of attorneys' fees, flatly rejecting the petitioners' request that the attorneys' time be relegated to a position of secondary importance. Judge Wyzanski noted that:

> ". . . unless time spent and skill displayed be used as a constant check on applications for fees, there is a grave danger that the bar and bench will be brought into disrepute . . . .
>
> "Admittedly commercial considerations will always play some part in the practice of the law. But the nature of our calling as an 'ancient and honorable profession' precludes judicial awards of counsel fees so high as to excite the warranted indignation of those whose money is used,—or the understandable criticism of those who successfully perform equally complicated and publicly useful tasks at the bar,—or the justified outrage of the public if a court should use other people's money to make an award equal to what ordinarily is earned only over many years as compensation for services that took a short time to perform." *Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 55, 61-62 (D. Mass. 1963)

In affirming Judge Wyzanski's opinion *sub nom., Green* v. *Transitron Electronic Corp., supra,* the First Circuit observed that:

> ". . . the fact that the actions were terminated prior to extensive litigation is deserving of much practical consideration. The settlement . . . avoided for the plaintiffs the heaviest part of their burden: further discovery,

preparation for trial, appearances in court, and the possibility of ultimate failure with the result of no compensation whatever." 326 F. 2d at 497.

Here, of course, there has been no discovery, only a few brief hearings in the trial court, and a quick settlement fortuitously reached because of considerations far removed from the skill or ability of plaintiffs' counsel. The Seventh Circuit could do nothing other than materially reduce an award of $1,000 per hour resulting from the trial court's "exorbitant allowance" or the result would have been to "bring both the bar and the bench into public disrepute." *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d at 570.*

V.

ANY BENEFITS ACCRUING TO THE CLASS ARE NOT FAIRLY ATTRIBUTABLE TO THE EFFORTS OF PLAINTIFFS' COUNSEL

Notwithstanding plaintiffs' counsel's insistence that the Seventh Circuit failed to give suffcient emphasis to such benefits as were allegedly conferred upon the class, the appellate opinion conclusively demonstrates that the criterion was fully discussed and thoughtfully applied as one of the several pertinent standards upon which the various Courts of Appeal are in general agreement. The Seventh Circuit carefully noted in giving weight to this factor, however, that ordinarily "the benefits conferred upon the class

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* Neither the Seventh Circuit nor Flying Tiger has any quarrel with the results reached in the cases cited by plaintiffs' counsel where supposedly large "contingent" or percentage awards were made. In none of them does the hourly rate remotely approach that of plaintiffs' counsel here and in all a substantial time in discovery, trial, appeal, etc., was involved or else the fee had been agreed to and was not in dispute.

are achieved through the direct effort and skill of the attorneys involved" yet "it is far from clear that this was so in the instant case." (Op. 4a) A review of the record and circumstances of settlement fully support the Court's determination.

As set forth in the Counter Statement, *supra,* this litigation was settled at a conference in New York on a Sunday because plaintiffs' counsel had created a disastrous situation, harmful to their own clients and to the class they sought to represent, whereby trading had been halted on the national exchanges in all Flying Tiger securities. Obviously, this presented an untenable situation for any holder of Flying Tiger securities *including* the members of the class represented by plaintiffs' counsel. The class' investment, worth more than $65 million, was frozen by the action of its own counsel. They could neither buy nor sell. If trading were not restored, stockholders would face the prospect of calls for additional or substitute collateral on bank or broker loans secured by Flying Tiger securities and the orderly liquidation of estates holding Flying Tiger securities would have been dangerously disrupted. These are but a few of the serious consequences that flow from any elimination of an auction market in a security that is a freely transferable asset (App. 172, 185-186).*

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* Plaintiffs' counsel, as fiduciaries charged with the protection of the members of the class, and as self described "established specialists in securities and stockholder matters and related litigation" (App. 218) had an obligation, before seeking an injunction against the stock dividend to determine the possible consequences and advise the Court accordingly. This they did not do. On the contrary, petitioners challenged counsel for Flying Tiger in argument before the court to explain the disastrous consequences that would flow from the issuance of an injunction. ". . . [N]o harm will occur to Flying Tiger or its shareholders by delaying it. I would like to hear how it is going to harm them." (App. 169).

A settlement was reached on that Sunday in March because of the compulsion on both plaintiffs and Flying Tiger to restore trading in Flying Tiger securities and bring order out of the injunction caused confusion. Thus, as stated in the settlement agreement and noted in the opinion of the Court of Appeals:

> ". . . plaintiffs through their attorneys obtained an agreement in principle to settle this matter on reasonable terms and *were acutely concerned about the suspension of trading privileges* of the Flying Tiger securities on the New York Stock Exchange and the American Stock Exchange and the possible adverse effects of this suspension on the value of these securities . . ." (Op. 6a-7a)

Likewise as noted in the opinion (Op. 5a) and as set forth in the settlement agreement, there was an additional incentive to Flying Tiger to make this special settlement which had nothing to do with the litigation but rather involved a proposed new regulation of the Internal Revenue Service. This regulation, published after the declaration of the 5% stock dividend by Flying Tiger, could have made the dividend taxable as ordinary income to all Flying Tiger common stockholders contrary to previous practice and the belief of Flying Tiger's counsel. Assuming a 35% marginal tax bracket for such stockholders, a tax of approximately $3.2 million would have been levied on these stockholders requiring payment in cash despite the fact that no cash consideration of any kind would be received. Obviously, Flying Tiger had to respond to this unforeseen tax development in a way that would be in the best interests of its stockholders. The injunction obtained by plaintiffs' counsel came only a few days after the announcement of the new tax regulation and while Flying Tiger was still considering its impact. It occurred to Flying Tiger that a change in the dilution provisions of the securities issued to former North

American shareholders in the merger would not only provide a means of using corporate securities to avoid the rigorous cash impact of the proposed regulation on its common stockholders, but might also be welcomed by plaintiffs' counsel as a graceful means of extricating themselves from the disastrous consequences of the injunction they obtained without consideration of its consequences. In both the stipulation of settlement and in the proxy materials accompanying the settlement, Flying Tiger has stated that the changes in the nature of the securities were designed "primarily to avoid" the adverse impact of the new tax regulations (App. 190).

After the Sunday settlement, the disastrous injunction was lifted and trading in Flying Tiger securities resumed on Monday, March 29, 1971 (App. 331).

Plaintiffs' counsel obtained the injunction for a brief period of time until it was dissolved by agreement. It benefited no one. It injured everyone. It created no fund from which a fee could be extracted. In fact, it put in jeopardy the substantial profits already realized by the plaintiffs themselves, as a result of the merger.* Plaintiffs' counsel succeeded only in creating an untenable situation for their own clients' investments and those of the Flying Tiger common stockholders. No novel legal theory was involved. In fact, none of the specific relief requested in the complaint was embodied in the provisions of the final settlement agreement. No trial or discovery took place. No massive legal effort was required nor expended.

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* In December, 1970 when petitioners sought to enjoin the merger between Flying Tiger and North American, North American common stock was trading at approximately $21-22 per share. Since the effective date of the merger (January 7, 1971) the value of the Flying Tiger package received by North American stockholders for each share of North American common stock had risen to $39¼ as of March 22 (the day the injunction against the stock dividend was granted) (App. 254).

In reliance on these record facts and the decided cases, the Court of Appeals reduced the initial fee award to $75,000 concluding that amount to be appropriate and adequate. There is no need for review by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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